

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 12**

**HOLMES REGIONAL NURSING CENTER<sup>1</sup>**

**Employer**

**AND**

**Case 12-RC-8386**

**UNITE! UNION OF NEEDLETRADES,  
INDUSTRIAL & TEXTILE EMPLOYEES,  
AFL-CIO, CLC**

**Petitioner**

**REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION**

Holmes Regional Nursing Center, d/b/a Life Care Center of Melbourne (the Employer) operates a skilled long-term nursing care facility in Melbourne, Florida. On August 13, 1999, UNITE! Union of Needletrades, Industrial & Textile Employees, AFL-CIO, CLC (the Union) filed the petition in this case seeking to represent all full-time and regular part-time licensed practical nurses (LPNs) employed at the Employer's facility, excluding all other employees, office clerical employees, confidential employees, guards and supervisors as defined in the Act.

On August 26, 1999, a hearing was held to address the sole issue of whether the Employer's LPNs were statutory supervisors. On September 27, 1999, the Regional Director issued a Decision and Direction of Election deciding that the Employer's LPNs were not supervisors within the meaning of Section 2(11) of the Act and finding that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time licensed practical nurses (LPNs) employed by the Employer as charge nurses at its facility located at 606 E. Sheridan Road, Melbourne, Florida; excluding, all other employees, MDS Coordinators, office clerical employees, confidential employees, guards and supervisors as defined in the Act.

On October 20, 1999, the Board denied the Employer's request for review. On October 26, 1999, the Region conducted an election, which the Union won. On December 10, 1999, the

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<sup>1</sup> The facility in issue is currently operated by Melwood Nursing Center, LLC., herein called Melwood.

Union was certified as the exclusive collective bargaining representative of the bargaining unit employees described above. When the Employer refused to bargain, thereby challenging the Union's certification, the Union filed an unfair labor practice charge against the Employer in Case 12-CA-20491. On March 20, 2000, the Board, in Case 330 NLRB No. 144 (2000) [not reported in Board volumes], while granting the General Counsel's motion for summary judgment, upheld the Union's certification and ordered the Employer to bargain with the Union.<sup>2</sup>

On May 29, 2001, the Supreme Court issued its decision in NLRB v. Kentucky River Community Care, 532 U.S. 706, 121 S.Ct. 1861 (2001), rejecting the Board's interpretation of "independent judgment" in the test for supervisory status under Section 2(11) of the Act. On October 24, 2001, the Board issued an unreported Supplemental Decision and Order, vacating its Decision and Order of March 20, 2000, in Case 12-CA-20491, and denying the General Counsel's original motion for summary judgment. In its Supplemental Decision and Order, the Board decided to reopen the record and remand this case to the Regional Director of Region 12 for further consideration and to take additional evidence on the issue of whether the Employer's Lens "assign" and "responsibly direct" other employees and on the scope or degree of "independent judgment" used in the exercise of such authority.<sup>3</sup> On March 10, 2003, a supplemental hearing was held based on the Board's Supplemental Decision remanding this case to the Region.<sup>4</sup>

### **I. PROCEDURAL ISSUES**

The parties stipulated at the supplemental hearing that Melwood Nursing Center, LLC, herein called Melwood, is a Tennessee corporation with its principal office and place of business located in Cleveland, Tennessee and with facilities located in Melbourne, Florida and various other locations in the United States, and is engaged in the operation of nursing homes. The parties further stipulated that, during the past year, which period is representative of its annual operations, Melwood derived gross revenues in excess of \$100,000 and purchased and

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<sup>2</sup> The Board also ordered the Employer to provide relevant information to the Union in its capacity as the collective bargaining representative of the unit.

<sup>3</sup> The Board did not find it appropriate to revoke the Union's certification.

<sup>4</sup> The official record herein consists of the transcripts of both the original hearing and the supplemental hearing conducted on August 26, 1999 and March 10, 2003, respectively, as well as the exhibits introduced at, and the parties' briefs submitted in connection with, both hearings.

received at its Melbourne, Florida facility goods valued in excess of \$50,000 directly from points located outside the State of Florida.

The parties also stipulated that, on or about March 1, 2001, Melwood purchased assets of the business of Holmes Regional Nursing Center in Melbourne, Florida, herein called Holmes or the Employer,<sup>5</sup> and became the licensed operator of the Holmes facility and has employed as a majority of its employees individuals who were previously employees of Holmes. Based on the parties' stipulation, it appears that Melwood may have been or may be a successor of Holmes. However, this issue has not been raised in a Board unfair labor practice charge and the Board has not made a successorship finding in that regard.

At the hearing and in its post-supplemental hearing brief, the Employer's counsel objected to the Board's refusal to revoke the Union's certification and the decision to conduct the supplemental hearing in this case. In this regard, the Employer's counsel argued that there is a new employer, Melwood, in this matter and that the new employer had no involvement in the unfair labor practice proceeding in Case 12-CA-20491, which, the Employer's counsel contends, formed the basis for the Board's decision to reopen the record and remand this case to obtain further evidence about the supervisory status of the Employer's LPNs. In addition, the Employer's counsel argued that the Union no longer exists.

I reject the Employer's assertion that, because Melwood was not a party to the initial representation hearing or Case 12-CA-20941, it would not serve the purposes of the Act to certify the Union. I note that the Union is already certified and that the Board has declined to revoke that certification, and has remanded this matter to me for a limited purpose. Furthermore, the decision I am making herein applies to Holmes Regional Nursing Center, and whether or not this decision has any meaning with respect to Melwood is not being decided now, because that issue is not appropriately before me.

I also find no merit to the Employer's contention that the Union no longer exists because it has merged with another labor organization, namely Service Employees International Union. At the original hearing, the parties specifically stipulated that the Union is a labor organization within the meaning of Section 2(5) of the Act and the record contains no evidence to the

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<sup>5</sup> Jurisdiction over Holmes was established at the previous hearing.

contrary. In particular, there is no evidence in the record establishing that the Union has merged with another labor organization. The Board has held that, in cases involving either the affiliation of one union into another or where two or more unions merge, an employer must continue to bargain with a labor organization if the merger or affiliation process was conducted by a vote having adequate due process safeguards and if the organizational changes are not so dramatic that the post-affiliation entity lacks substantial continuity with the preexisting union or unions. Sullivan Bros. Printers, 317 NLRB 561, 562 (1995); Mike Basil Chevrolet, Inc., 331 NLRB 1044 (2000). However, the record here is devoid of any evidence concerning the alleged merger between the Union and another labor organization. Thus, I find no merit to the Employer's claim in this regard.<sup>6</sup>

At the hearing, the Employer's counsel expressed uncertainty about the nature and scope of the evidence to be adduced at the supplemental hearing. In particular, the Employer's counsel stated that there existed confusion concerning whether the supplemental hearing would consist of evidence about the current duties and responsibilities of the Employer's LPNs or about their duties and responsibilities in 1999, when they worked for the predecessor company Holmes and at which time the Union had been certified as the collective bargaining representative of the bargaining unit employees.

The Union's counsel took the position that the only question to be determined is whether the Board, in 1999, properly certified the Union as the exclusive collective bargaining representative of the bargaining unit employees in light of the Supreme Court's Decision in Kentucky River. In this regard, the Union's counsel noted a standing objection to the introduction of any evidence of facts occurring after the election and certification of the Union in 1999, inasmuch as the Union contended that such evidence was beyond the scope and terms of the Board's Supplemental Decision remanding this case and directing the reopening of the record herein.

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<sup>6</sup> The Employer's counsel also argued that the Employer's due process rights were violated because of the delay in scheduling the instant hearing after the Board issued its Supplemental Decision and Order to remand this case. I reject this argument, inasmuch as there is no evidence to show that the Employer was deprived of due process or that it suffered prejudice from any claimed delay.

I find that the relevant time period to analyze, for purposes of determining whether the Employer's LPNs engaged in duties sufficient to characterize them as statutory supervisors, is throughout the period of time immediately preceding the election conducted in this case on October 26, 1999, which resulted in the Union's certification on December 10, 1999. Thus, I find that the evidence introduced at the supplemental hearing, concerning the current duties and responsibilities of the Employer's LPNs, is not material to a determination of the supervisory status of the Employer's LPNs, as encompassed within the Board's Supplemental Decision and Order remanding this case. However, to the extent that the record reflects that the current duties and responsibilities of Melwood's LPNs are the same or similar to the duties of the Employer's LPNs, I will also consider those facts to determine whether the Employer's LPNs were statutory supervisors.

In its post supplemental-hearing brief, the Employer argued that the Region and the Board should review the facts of this case on a *de novo* basis as it relates to the determination of whether the LPNs are supervisors within the meaning of the Act. However, the Board's Supplemental Decision and Order is clear that reconsideration of this case is limited solely to whether the Employer's LPNs "assign" and "responsibly direct" other employees and on the scope or degree of "independent judgment" used in the exercise of such authority. Accordingly, contrary to the Employer's request, I will not review the facts of this case on a *de novo* basis to determine whether the Employer's LPNs were statutory supervisors, but instead will restrict my analysis to the Board's specified parameters.

The sole issue in this supplemental proceeding is whether, in light of the Supreme Court's decision in Kentucky River, the Employer's LPNs assigned and responsibly directed other employees using independent judgment, so as to support a finding that the LPNs were statutory supervisors during the relevant time period. Contrary to the Union, the Employer argues that the LPNs were supervisors under the Act. Thus, the Employer argues that the petition should be dismissed.

I have considered the evidence and the arguments presented by the parties on the sole issue presented in this case. As discussed below, I have concluded that the LPNs were not statutory supervisors, and that the certification of representative should not be revoked.

To provide a context for my discussion of the issue, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts, which for the most part were established at the original hearing, and the reasoning that supports my conclusion on the issue.

## **II. OVERVIEW OF OPERATIONS**

The Employer operated a skilled long-term nursing care facility in Melbourne, Florida, with an approximate patient capacity of 120 beds. The facility is housed in one building structurally composed of four hallways, which form a square and are numbered 100, 200, 300 and 400. Three of the hallways (100, 200, and 400), which are referred to as units, were designated for long-term care.<sup>7</sup> The remaining hallway (unit 300) was designated for sub-acute care.<sup>8</sup> Depending on the hallway, there could be anywhere from 20 to 30 rooms in each unit. In 1999, the Employer admitted an average of 83-85 patients into its facility, but Melwood currently admits approximately 115 patients. The nursing department operated 24 hours a day, 7 days a week, with a day shift from 7:00 a.m. to 3:00 p.m., an evening shift from 3:00 p.m. to 11:00 p.m. and a night shift from 11:00 p.m. to 7:00 a.m.

The facility at issue is headed by an administrator who, in 1999, was Ron Kilgore and, since March 2001, has been Nancy McGoldrick. The next level of management were the department heads, which included the director of nursing (DON) who, in 1999, was Mary Lou Carr. The DON was responsible for overseeing and managing patient care in the nursing department. In 1999, the DON oversaw an assistant director of nursing (ADON), but that position is currently vacant. Melwood currently employs two unit managers or coordinators who report directly to the DON. One of the unit managers, Brian Foy, is a registered nurse (RN) who oversees the licensed nurses (LPNs and RNs) in units 300 and 400; the other unit manager is an LPN who oversees the licensed nurses in units 100 and 200.<sup>9</sup> The duties of the unit managers are in effect 24 hours a day, 7 days per week. When away from the facility, the unit managers are on-call and are contacted by the staff, if needed. The RN unit manager performs

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<sup>7</sup> As the term implies, long-term care is provided to patients who are in the facility for an extended period of time.

<sup>8</sup> Sub-acute care is provided to short-term stay patients who are in need of skilled services such as intensive therapy.

<sup>9</sup> In 1999, the Employer used the term "charge nurse" to describe RNs and LPNs who oversaw the work of CNAs. However, Melwood currently refers to charge nurses as "licensed nurses," but they essentially function as charge nurses.

the duties of the DON during times when the DON is off from work, on vacation or in a meeting. In this regard, the RN unit manager is equivalent to an ADON.

In 1999, below the ADON were the charge nurses, comprised of RNs and LPNs, and the certified nursing assistants (CNAs). At that time, the Employer employed approximately 20 full-time and regular part-time LPNs and approximately 5 RNs who worked as charge nurses. Currently, Melwood employs 8 full-time RNs and 1 regular part-time RN, as well as 18 LPNs who perform the duties of charge nurses.

As noted above, the facility has three long-term care units and one sub-acute care unit. In 1999, each unit was staffed by a charge nurse, except for the night shift, which only had three charge nurses serving the four units. On those occasions, one charge nurse was assigned to service two units. In 1999, the sub-acute care unit, which primarily served Medicare or HMO patients staying at the facility for a short period of time, was always staffed by an RN charge nurse so there was always at least one RN present in the facility. In 1999, the day shift was usually staffed with about nine CNAs, while the evening and night shifts were staffed with about eight and four CNAs, respectively. In general, charge nurses were responsible for the total nursing care of patients during their shifts and, in carrying out their duties, they oversaw the work of the CNAs.

### **III. STATUS OF LPNs**

Before examining the specific duties and authority of the LPNs, I will briefly review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” Thus, employees are statutory supervisors if (1) they hold the authority to engage in any one of the 12 specific criteria listed; (2) their “exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment”; and (3) their authority is held in the “interest of the employer.” Kentucky River, 121 S.Ct. at 1867; Harborside Health Care, Inc., 330 NLRB 1334 (2000); Ohio

Power Co. v. NLRB, 176 F. 2d 385 (6<sup>th</sup> Cir. 1949), cert. denied 338 U.S. 899 (1949).

The burden of proving supervisory status lies with the party asserting that such status exists. Kentucky River, 121 S.Ct. at 1866; Michigan Masonic Home, 332 NLRB No. 150, slip op. at 1 (2000). The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act, and because Congress' intent to include professional employees under Section 2(12) would be nullified. NLRB v. Yeshiva University, 444 U.S. 672 (1980); Vencor Hospital-Los Angeles, 332 NLRB 1136, 1138 (1999). The legislative history of Section 2(11) also reflects that Congress intended the definition of supervisor to apply to those employees with "genuine management prerogatives." S. Rep. No. 195, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess. 19 (1947), 1 NLRB Legis. History of LMRA 1947, pp. 410, 425 (1948). Lack of evidence is construed against the party asserting supervisory status. Michigan Masonic Home, 332 NLRB No. 150, slip op. at 1. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991).

The exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not require a finding that an employee is a supervisor within the meaning of the Act. Somerset Welding & Steel, 291 NLRB 913 (1988). Designation of an individual as a supervisor by title in a job description or other documents is insufficient to confer supervisory status. Western Union Telegraph Company, 242 NLRB 825, 826 (1979). Moreover, the employer's directive or a job description setting forth supervisory authority also does not conclusively establish supervisory status. Bakersfield Californian, 316 NLRB 1211 (1995); Connecticut Light & Power Co., 121 NLRB 768, 770 (1958). On the other hand, possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status even if this authority has not yet been exercised. See, e.g., Fred Meyer Alaska, 334 NLRB No. 94, slip op. at 4 n. 8 (2001); Pepsi-Cola Co., 327 NLRB 1062, 1063 (1999). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See Michigan Masonic Home, 332 NLRB No. 150, slip op. at 3. Thus, the question is whether the evidence demonstrates that the individual actually possesses any of the powers enumerated in Section 2(11). Western Union Telegraph Company, 242

NLRB at 826; North Miami Convalescent Home, 224 NLRB 1271 (1976).

As noted above, the Board has directed me to further consider the issues of whether the LPNs “assigned” or “responsibly directed” other employees, and the extent to which they used “independent judgment” in doing so. Accordingly, after providing an overview of the LPN position, I will discuss the role of the LPNs in assignments (including training and providing adequate staffing) and responsible direction of other employees.

#### **A. Overview of LPN Position**

The record contains a job description for the job classification of “charge nurse.” With respect to the assignment and direction of work of nursing personnel, the job description sets forth the following functions: “supervises direct patient care personnel in the unit” “sees that the individual nursing care plan is followed” “prepares and administers or supervises the preparation and administration of all medications;” “administers or supervises all prescribed treatments” “administers or supervises all prescribed diets and fluid intake” “assures rehabilitative nursing procedures are performed;” “directs and does charting on his/her shift;” “sees that all personnel on the shift are oriented to the duties assigned to them;” “ assigns personnel according to policy outlined by nursing services;” “assists in interpreting the goals and objectives of the facility to nursing service personnel;” “supervises, teaches, and counsels all nursing personnel,” “performs or supervises the performance of rehabilitative nursing;” “when appropriate, supervises other personnel who are administering medication and treatments, charting or giving direct patient care;” “reviews assignments with CNAs and assignments posted;” “checks ADL sheets for care being done and signatures;” “monitors bath and shower schedule – century tub, shaving, hair care, nail care, oral hygiene;” “supervises nursing personnel on his/her shift as assigned;” and, “in absence of a supervisor, writes all nursing assignments for those in her charge consistent with their education, preparation and experience.”<sup>10</sup>

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<sup>10</sup> Melwood currently has job descriptions for the titles of RN and LPN. The RN job description provides, in part, that RNs are to “supervise” LPNs and CNAs. The LPN job description provides, in part, that LPNs are to “supervise” CNAs. Furthermore, in March 2002, Florida Health Care Association, a state governmental agency, prepared a “supervisory” education course for LPNs. All of the LPNs were required to complete the 30-hour course by August 31, 2002, which they all completed, if considered “supervisors” by the Florida Board of Nursing.

The record testimony, however, does not show in detail how LPNs actually carried out all of the foregoing functions and responsibilities in the course of their daily activities. At the original hearing, the DON at that time, who was hired by the Employer 3 months prior to the original hearing, testified that during the second week after she was hired she had a meeting with the licensed staff, which included the RNs and the LPNs, to discuss the goals of the nursing department. Without much specificity, the former DON testified that, on July 1, 1999, she distributed to the charge nurses the written job descriptions referenced above, asked them to familiarize themselves with the document, and highlighted to them the areas concerning their accountability for patient care in their units, including their responsibility to supervise and direct the work of the CNAs responsible for that care. The former DON also discussed the charge nurses' responsibility in evaluating the CNAs' work performance. A few weeks prior to the original hearing date, the former administrator held his own meeting with the licensed staff to go over their duties and responsibilities.

The record reflects that the charge nurses' primary function was to engage in patient care, such as administering medication, monitoring food and fluid intake, effecting treatments and monitoring positioning. The charge nurses also called the doctors for their orders. The charge nurses reported directly to the DON or the ADON, regardless of whether the charge nurse was an LPN. The record shows that an LPN's typical day was as follows: first she found out how many CNAs were on duty in the unit; then she received the report of the nurse going off duty; she then found out from the DON, the ADON, the scheduler, or the sub-acute care unit RN the ratio of CNAs to patients, and she started passing out the medication to the patients. Passing out medication consumed approximately three and a half hours of her day. The LPN then performed treatments of patients who required them; some treatments took up to one hour to complete. About two hours in the day were spent passing out meal trays and feeding the patients. The rest of her time was spent walking around her unit overseeing the work of the CNAs and making sure that their assignments were completed properly. If the facility was short-staffed, an LPN might also assist in performing a CNA's duties, such as bathing patients.

### **B. Assignments**

The CNAs were responsible for care of the patients, including bathing, dressing, feeding,

hydrating, ambulating, positioning and assisting them to the bathroom. Charge nurses were responsible for ensuring that the CNAs completed their assignments and that patients were cared for properly. LPNs were also responsible for telling CNAs to correct anything they might have done incorrectly.

The types of nursing care that CNAs were required to render to a particular patient were contained in a document called “Activities of Daily Living,” more commonly referred to as the “ADL” book. The ADL book was prepared for each patient after a patient checked into the facility.<sup>11</sup> The CNA was responsible for knowing the content of the ADL book and for providing care that was consistent with its requirements. The charge nurse was not allowed to make any changes to the ADL book. The ADL book had worksheets indicating the type of tasks required, such as bathing the patient and cleaning dentures. The CNA checked off these tasks as she completed them. An LPN might also help a CNA carry out patient care duties and initialed the ADL book for those tasks that she performed.<sup>12</sup>

The nursing department had a monthly schedule, which showed the various shifts and days employees were assigned to work. The monthly schedule was prepared by a “scheduler,” who was an assistant to the DON, and the monthly schedule was reviewed by the DON. The scheduler took into consideration any special requests for time off.<sup>13</sup> There was another schedule referred to as the “daily assignment sheet,” also prepared by the scheduler, which showed the daily shifts and units the nursing staff was assigned to work. It also contained the name and number of the on-call person. That schedule was posted at each unit. The top of the document stated, “no changes unless done by the charge nurse.” There was also a schedule assigning CNAs to specific patient rooms. Room assignments were prepared by the charge nurse and she could make changes to those assignments as noted above. The record reflects that, during the evening shift, it was the sub-acute care unit RN who made room assignments

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<sup>11</sup> The record is not clear as to who prepared the ADL book.

<sup>12</sup> Florida State regulations mandate that CNAs provide a certain number of direct patient care hours per patient, per day. As of January 2003, the required direct patient care contact is 2.6 hours per patient, per day.

<sup>13</sup> Melwood currently employs a staffing coordinator who prepares a monthly schedule showing the shifts to which all employees, including CNAs, are assigned.

for the CNAs. The record also shows that, for the most part, CNAs were assigned to the same patient rooms in the interest of providing continuity of care.<sup>14</sup>

CNAs learned their daily assignments from the above-described daily assignment sheet, which was prepared for each unit by the scheduler in conjunction with the DON. The record shows that within each unit the designated charge nurse could rearrange the schedule to provide the best patient care possible. For example, a charge nurse might decide to reassign a task from one CNA to another based on their relative workloads. The charge nurse might also direct CNAs to perform certain tasks for a patient not assigned to them, such as taking the patient's vital signs, or passing out water to rooms not assigned to them, in circumstances when the regularly assigned CNA was momentarily unavailable. If a patient complained to the charge nurse about a CNA, the charge nurse had the authority to reassign another CNA to that patient. The record demonstrates that, on the evening shift, assignment problems were resolved between the CNAs first, and then if they could not work out the problem, they took the issue to the RN in the sub-acute care unit who would evenly divide the CNAs among the four units.

There were guidelines in the nursing department regarding when lunches and breaks could not be taken. They were drafted by the DON, and were based on a federal requirement that staff meals cannot be taken during patient meal service. These guidelines were posted at the facility and both the charge nurses and the CNAs were expected to follow them. The former DON testified that the charge nurses had the flexibility to tell a CNA when she could go to lunch, as demanded by patient care needs, outside of those times when lunches could not be taken. In addition, based on patient care needs, charge nurses could tell CNAs when they could take

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<sup>14</sup> Currently, every one or two days, Melwood's staffing coordinator completes an assignment sheet, with input from the licensed nurses (RNs and LPNs), specifying the unit in which CNAs are assigned to work. Factors that are considered in making the CNA unit assignments are the number of staff and the acuity of the patients. Acuity means the medical condition of a patient and, from a medical standpoint, the amount of attention or supervision a patient would need. Licensed nurses currently utilize an assignment sheet, developed by the staff coordinator with input from the licensed nurses, in order to assign CNAs to residents' rooms. However, for the most part, CNAs are assigned to the same resident rooms in order to maintain the continuity of care for the patient. Using the pre-printed assignment sheets, licensed nurses also assign CNAs other routine tasks such as dining room times, fire extinguisher duties, utility room duties, shower room cleaning and nourishment room stocking. The specific tasks listed on the assignment sheet are described in Melwood's policies and procedures manual and are also explained during a new employee's orientation period. Licensed nurses also assign CNAs to break and lunch times. The break times are pre-printed on the assignment sheet, which also provides that a maximum of two CNAs can take lunch at the same time. The assignment sheet also contains 12 other pre-printed directives for CNAs. At the end of each day, the assignment sheets are given to the staffing coordinator.

breaks. An LPN charge nurse testified that the LPNs and CNAs decided among themselves regarding who and when they would go to lunch. The LPN charge nurse said that, as long as there was one nurse and one CNA available on the unit, anyone could go to lunch.

With respect to staffing, CNAs called their charge nurse if they were sick and could not report to work. The charge nurse was responsible for finding a replacement immediately. In doing so, charge nurses were assisted by guidelines generated by the DON that were printed in the communication book for the charge nurses to read and follow. It was expected that staffing replacements were to be obtained from in-house employees before resort was made to outside agencies. Charge nurses had the discretion, if there were no administrative personnel at the facility, to decide how to get staff coverage, including calling outside agencies, if necessary. If a staffing shortage occurred, a charge nurse might telephone the on-call nurse to apprise her of the situation. However, the record shows that the DON was on duty Monday through Friday, from 8:00 a.m. to 7:00 p.m., that the ADON's work hours were from 7:00 a.m. to 4:00 p.m. and that both the DON and ADON were always available by telephone.<sup>15</sup> Also, the record discloses that the DON had taken steps to deal with situations involving staffing, such as, in the second week of August 1999, creating the position of resource nurse to handle staffing problems in the event the DON or the ADON was not in the building. The purpose of the resource nurse was to have one charge nurse, rather than four, contact agencies to get staff coverage for all units, when necessary. The resource nurse had the authority to rearrange staffing. The DON assigned a charge nurse on each shift to serve as a resource nurse on a rotating basis.

The nursing department maintained an LPN on call every 24 hours. The on-call LPN was contacted only when all attempts to fill staffing requirements through outside agencies had failed. The MDS coordinator was also on-call and performed charge nurse functions if staffing demanded it. The former DON testified that she had been called at home to discuss staffing issues when someone had not reported to work. The former DON also stated that she was called at home over the weekend to provide assistance when there was a staffing crisis, such as when a replacement could not be found.

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<sup>15</sup> The record is silent as to the ADON's workdays.

The former DON testified that charge nurses had the authority to allow a CNA to leave work early and to direct CNAs to work beyond their regular work hours. However, when pressed on cross-examination about whether the charge nurses could compel a CNA to work overtime, the DON stated that, “one cannot keep anyone in the building if they choose to leave.” An LPN testified that she asked the CNAs whether they were willing to work beyond their regular hours.

I find that the authority of the LPNs to assign particular CNAs to tasks or to request that a CNA perform a specific task was exercised without the degree of independent judgment sufficient to confer supervisory status. Beverly Health and Rehabilitation Services, Inc., 335 NLRB No. 54 (2001) (LPNs exercised only routine authority that did not require the use of independent judgment in directing the work of other employees within the meaning of Section 2(11) of the Act.) CNAs performed essentially repetitive daily tasks, requiring minimum skills for the same residents. Thus, the role that LPNs played in assigning CNAs to perform specific jobs was merely routine. This was especially true since even the largest nursing unit had an approximate ratio of two CNAs to one LPN. There is no evidence that residents’ needs or CNAs’ skills differed significantly within a particular unit. Moreover, the scheduling of lunch or break times was routine, and LPNs could not force a CNA to work overtime.

Furthermore, both LPNs and CNAs were guided by and followed the Employer’s policies and procedures. The Board has held that the assignment of tasks in accordance with an employer’s set practice, pattern or parameters, or based on such obvious factors as whether an employee’s workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition. Franklin Hospital Medical Center, 337 NLRB No. 132 (2002). Similarly, matching an employee’s skills to a routine function is not supervisory authority under the Act. Ten Broeck Commons, 320 NLRB 806, 810 (1996). Cf. NLRB v. Quinnipiac College, 256 F. 3d 68, 75 (2d. Cir. 2001) (shift supervisors who regularly and independently assessed non-routine situations such as fire alarms and deployed staff to cover those situations were statutory supervisors). In addition, LPNs did not prepare monthly schedules. See Providence Hospital, 320 NLRB 717, 731 (1996). Instead, the Employer employed a scheduler to assign employees, including CNAs, to their scheduled workdays, taking into account staffing ratios.

The record also reflects that LPN charge nurses were partially responsible for generating an initial patient care plan upon a patient's admission to the facility. However, preparing a care plan and directing other employees to carry it out does not of necessity require the use of Section 2(11) independent judgment. Illinois Veterans Home at Anna L.P., 323 NLRB 890, 891 fn. 5 (1997). I find this duty insufficient to confer supervisory authority in the present case.

To the extent LPNs might call in additional staff or temporarily assign CNAs to different units to cover staffing shortages, such assignments, made to equalize employees' workload made on a rotational or other rational basis were routine assignments. King Broadcasting Co. d/b/a KGW-TV, 329 NLRB 378, 382 (1999); Providence Hospital, supra at 717; Ohio Masonic Home, 295 NLRB 390, 395 (1989); Cf. NLRB v. Quinipiac College, supra at 75-76.

Accordingly, I find that the LPNs did not exercise sufficient independent judgment in making assignments and that the Employer's established policies and procedures limited the LPNs' judgment to such a degree that it fell short of the statutory independent judgment required for supervisory status. Dynamic Science, Inc., 334 NLRB No. 57, slip op. at 2 (2001); Chevron Shipping Co., 317 NLRB 379, 381 (1995), cited with approval in Kentucky River. See also Greenhorne & O'Mara, 326 NLRB 514, 527 (1998).

The record further shows that charge nurses took part in training functions. The former DON testified that charge nurses were responsible for training the CNAs regarding the implementation of new or changed policies. In 1999, the LPNs were required to educate the CNAs in their units on a state survey regarding a new skin checking system. The Employer also held meetings with its licensed staff, which included LPNs and RNs, but excluded CNAs. At these meetings, state surveys were reviewed and issues regarding patient care were discussed. In addition, committees were formed to develop nursing systems that might result in policy changes. As an example, an LPN led a committee in the development of a new system for skin assessment that was implemented by the Employer. However, there is no evidence that the training given by LPN charge nurses was anything more than instruction in and review of the procedures and routines of the Employer's facility, all of which were developed and established by the Employer's management officials. The level of training provided by LPN charge nurses does not show any exercise of independent judgment. Chrome Deposit Corp., 323 NLRB 961

(1997).

### **C. Responsible Direction of Other Employees**

LPNs used their expertise and judgment to assess residents' needs. They assigned CNAs routine tasks based upon the ADL book and the Employer's policies and procedures. The LPNs and CNAs followed the detailed ADL book to provide resident care. The ADL book specified all the tasks that had to be completed. Moreover, CNAs might also report changes in a resident's condition to the LPN. The CNAs performed the tasks in the ADL book, and the LPN made sure the tasks were completed. If an LPN received an order from a doctor to provide a resident a specific treatment such as increased fluid intake or exercises, the LPN instructed the CNA assigned to the resident to perform the task. In addition to the ADL book, the Employer had a detailed job description for charge nurses describing their duties and obligations. The charge nurse's job description stated that a charge nurse "[i]s responsible for the total nursing care of patients during his/her shift" and "[m]aintains a quality of service that will fulfill the objectives of the facility and be in accord with the policies and procedures set forth by the facility's administration and governing body." In addition, the charge nurse's job description stated that a charge nurse "must comply with federal, state and local requirements."

In Kentucky River, the Court took issue with the Board's categorical exclusion of those using ordinary technical and professional judgment in directing those less skilled from the definition of a supervisor and with the fact that the Board seemed to apply its categorical exclusion of professional or technical judgment when evaluating the "independent judgment" prong only to the "responsibly to direct" factor, as opposed to all 12 factors. The Court reasoned that this per se approach was inconsistent with the language of Section 2(11) and the Court's decision in NLRB v. Health Care and Retirement Corp., 511 U.S. 571 (1994), wherein the Court ruled that the test for supervisor status under the Act applies the same to professionals as to other employees. The Court requested that the Board perform a factual analysis, rather than to automatically exclude individuals from the definition of a statutory supervisor, taking into consideration the degree of judgment and the amount of employer constraints on the individuals.

However, the Court recognized that it was within the Board's discretion to determine the

degree of judgment required for supervisory status. Kentucky River, 121 S.Ct. at 1867. The Court also agreed with the Board that an individual might not be held a supervisor if the employer limits the degree of independent judgment by, for example, detailed orders. Kentucky River, *id.* (citing Chevron Shipping Co., 317 NLRB at 381). In addition, while the Court explicitly refrained from interpreting the phrase “responsibly to direct,” the Court suggested that the Board could interpret this phrase by “distinguishing between employees who direct the manner of others’ performance of discrete tasks from employees who direct other employees as [Section] 2(11) requires.” Kentucky River, 121 S.Ct. at 1871, citing Providence Hospital, 320 NLRB at 729.

In Providence Hospital, the Board noted that assignments of tasks could overlap with direction, for example, ordering a nurse to take a patient’s blood pressure could be viewed either as assigning the nurse to take a patient’s blood pressure or directing the nurse in the performance of patient care. Providence Hospital, *id.* at 727. However, regardless of whether it is an assignment or a direction, it is within the Board’s reasonable discretion to decide if the instruction requires independent judgment or is routine. *Id.* at 729; Ten Broeck Commons, 320 NLRB at 810. In this regard, the Employer argues that LPNs assigned the CNAs to perform important tasks for the safety and well-being of residents. While the tasks that the CNAs performed were undoubtedly important to the residents’ well being, they nonetheless remained largely repetitive and routine. See Loyalhanna Health Care Associates, 332 NLRB 933 (2000). See also Northern Montana Health Care Center, 324 NLRB 752, 753 (1997).

Moreover, the assignment of these routine tasks in accordance with the Employer’s procedures and policies, such as the ADL book, further demonstrates that the use of independent judgment was not required. Kentucky River, 121 S.Ct. at 1867; Chevron Shipping Co., 317 NLRB at 381; Express Messenger Systems, 301 NLRB 651, 654 (1991); Bay Area-Los Angeles Express, 275 NLRB 1063, 1077 (1985). Finally, the record does not establish that LPNs were held accountable for the performance of work by other employees in the fashion found in Quinnipiac College, 256 F.3d at 76 (shift supervisors disciplined for actions of other employees were statutory supervisors). See also Harborside Healthcare, Inc., 330 NLRB 1334, 1336 (2000) (to establish independent judgment, concrete evidence must reflect how such

decisions are made); see also Crittenton Hospital, 328 NLRB 879 (1999) (state nurse practice laws which require nurses to “supervise” employees with lesser skills, but “do not purport to in any way track the NLRA’s definition” of the term “supervise”).

I conclude that the LPNs did not responsibly direct employees using independent judgment. The LPNs directed CNAs to perform discrete tasks such as changing dressings, taking a resident’s temperature, increasing fluid intake, and changing a resident’s bed position. LPNs and CNAs alike followed the ADL book and the Employer’s various standard operating procedures in performing these functions. The record does not reflect that LPNs could deviate from standard operating procedures in assigning tasks to CNAs. The CNAs generally knew the tasks that needed to be accomplished because they were routine and repetitive in nature, and the CNAs had the skills necessary to perform those tasks. To the extent LPNs had on occasion assigned CNAs tasks during unusual circumstances, the record fails to establish that these situations occurred routinely or were handled by LPNs without following the Employer’s established procedures. Thus, the LPNs’ use of independent judgment to direct CNAs to perform discrete tasks was insufficient to confer supervisory status.

In support of its position that the LPN charge nurses were statutory supervisors, the Employer cited the Board’s decisions in American Commercial Barge Line, 337 NLRB No. 168 (August 1, 2002); Alter Barge Line, Inc., 336 NLRB No. 132 (December 14, 2001); Ingram Barge Company, 336 NLRB No. 131 (December 14, 2001) and Demco New York Corp., 337 NLRB No. 135 (July 26, 2002). However, I find the facts of those cases to be distinguishable from the case herein.

At issue in Alter Barge Line, Inc. and Ingram Barge Company were riverboat or barge pilots who routinely assigned and responsibly directed employees in their work. The Board agreed with the judge that those assignments and directives required the pilots to exercise independent judgment. For example, in ordering deckhands to quit other work and report to the tow for work involving navigation or safety, the pilot determined what work required immediate attention. The pilots were fully responsible for the safety of the crew, the tugboats and groups of barges that were often several hundred yards long. The Board noted that pilots did not perform routine work that other members of the crew performed and the Board found that in

directing the work of the mate or leadman and other deckhands, the pilot judged how best to apply the skills of those employees to handle the situation at hand. The situations were unpredictable and oftentimes caused by the weather, the current in the river, river traffic, and other factors.

Similarly, in American Commercial Barge Line, the Board found, consistent with the judge's supplemental decision, that the barge pilots had authority to responsibly direct the towboat crew in their work and to assign work and that they used independent judgment in exercising that authority. The Board further found that the pilots responsibly directed and assigned the work of the crew in the navigation of the towboat and that such direction and assignment involved the exercise of independent judgment. The Board specifically noted as follows:

[T]he pilots assign and responsibly direct the lookouts and have the discretion to wake the call watch man. The pilots make navigation decisions based on their evaluation of nonroutine factors including the river condition, problems with the boat, a "green" (inexperienced) man on crew, the type of cargo, whether barges are full or empty, and weather and traffic conditions. The pilots do not check with others before ordering that action be taken. Indeed, when the pilot is on watch, he is the sole wheelhouse official responsible for the safety of the vessel, crew, and cargo. If a crew member does something wrong during the pilot's watch, such as causing the tow to break loose, the pilot is held responsible. The consequences of an error in the pilot's judgment can be catastrophic, including a collision causing loss of life or a chemical spill. See Sun Refining & Marketing Co., 301 NLRB 642, 649 (1991) (the size, complexity, and cargo carried by a supertanker was a factor in determining that the disputed licensed officers working aboard the supertanker exercised responsible direction).

In the instant case, however, the LPN charge nurses did not engage in substantially similar duties as the barge pilots in the cases cited by the Employer. Rather, LPNs assigned CNAs to perform routine tasks and were constricted by the Employer's established policies and procedures. Furthermore, there is no evidence that residents' needs or CNAs' skills differed significantly within a particular unit. Accordingly, I find that the duties and responsibilities of the LPN charge nurses were sufficiently distinct from the barge pilots whom the Board found to be supervisors and that the LPNs' duties did not rise to the level of those of statutory supervisors.

In Demco New York Corp., cited by the Employer, the Board upheld the finding of the

judge that a foreman, William Grant, was a supervisor. The judge noted that Grant was the highest ranking representative of the employer at the jobsite; was paid substantially more as foreman than the other employees; told employees when to take their breaks and lunches and to change these based on need; assigned employees new tasks when they had completed their work assignments; inspected the quality of their work; signed employee time sheets; sent employees home when there was not enough work; called them back when there was; and asked employees to work overtime on occasion. The judge noted that Grant's duties also included many functions not entrusted to other employees, such as working with the other trades foremen on the job and the general contractor's representative, discussing the scope of the work with the project manager, and reviewing drawings to make sure the work was being done properly. I find that the LPNs did not possess or exercise the type or level of supervisory authority and independent judgment that the Board and the judge found on the part of foreman William Grant. Accordingly, Demco New York Corp. is inapposite to the instant case and I conclude that the Employer's LPNs were not supervisors within the meaning of Section 2(11) of the Act.

#### **IV. CONCLUSION**

As noted above, after the Board remanded this case, the Region conducted a supplemental hearing. Upon reconsideration, I reaffirm my findings in the Decision and Direction and Election and conclude that the LPNs did not "assign" or "responsibly direct" other employees using independent judgment so as to make them statutory supervisors.

#### **V. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, a request for review of this Supplemental Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST on **August 15, 2003**. Immediately upon the filing of a request for review, copies thereof shall be served on the Regional Director and the other parties. The request may not be filed by facsimile.

**DATED** at Tampa, Florida this 1<sup>st</sup> day of August 2003.

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